UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

E. I. DU PONT DE NEMOURS AND COMPANY

and

AMPTHILL RAYON WORKERS, INC., LOCAL 992, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS	Case 05-CA-090984
FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS	Case 09-CA-091793
INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL	Case 26-CA-092629

Gregory M. Beatty and Jason Usher, Esqs. for the General Counsel
Kris D. Meade and Glenn D. Grant, Esqs.,
(Crowell & Moring LLP), of Washington, D.C.,
for the Respondent
Kenneth Henley, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C. on June 12 and July 17, 2013, and Nashville, Tennessee on August 27 and 28, 2013. The Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers (the Union or Local 992), Freon Craftsman Union, Local 788, International Brotherhood of Dupont Workers (the Union or Local 788), and International Brotherhood of Dupont Workers (IBDW), Local 593, Old Hickory Employees Council (the Union or Local 593) (collectively, the Unions), represent employees at E. I. Du Pont De Nemours and Company's (the Company) facilities in Richmond, Virginia, Louisville, Kentucky, and Nashville, Tennessee, respectively. They allege that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] in January 2013 by implementing changes to employees' medical and dental benefits without first bargaining with them. The Company concedes that it made the unilateral changes, but

[1] 29 U.S.C. Sections 151-169.

contends that the Unions previously waived their rights to insist on bargaining over changes to employee-members' healthcare and dental benefits.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation, has been engaged in the manufacture of synthetic fibers and related products at its Richmond, Virginia,[4] Nashville, Tennessee[5] and Louisville, Kentucky facilities each of which annually sells and ships products, goods, and materials valued in excess of $50,000 directly to points outside the state where the facility is located. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

Headquartered in Wilmington, Delaware, the Company operates several facilities located throughout the United States. As of January 1, 2013, the Company had more than 34,000 employees in the United States, less than 3,700 of which were represented by a labor organization. In addition, approximately 80,000 company retirees and dependants participate in the Company's corporate-wide benefit plans.[6]

The Company employs approximately 2,500 employees at the Richmond plant, approximately 1,170 of whom are hourly production and maintenance (P&M), workers and

[2] The parties stipulated that all of the charges and amended charges were timely filed and served. (Jt. Exh. 4 at ¶¶ 58–59, 69–70, 81–82.)

[3] Just as in Case 5–CA–33461, there was little dispute as to the relevant facts. The parties stipulated to receipt of the hearing transcript in that case, as well as 106 sets of facts spanning three decades of their collective-bargaining relationship. (Jt. Exhs. 1–4.) In addition, the parties have long followed a custom and practice of relying on the Company's notes of their collective-bargaining meetings and I credit those records as fairly and accurately depicting what was discussed at those meetings. (Jt.Exhs. 21, 25, 32.) While there was testimony that the notes were not a "verbatim recitation" of the meetings, they were, at the very least "instructive" summaries as to the parties positions on the issues. (Tr. 214.)

[4] This facility is actually located in nearby Ampthill, Virginia and is also referred to as the Spruance plant.

[5] This facility is located in the Old Hickory section of Nashville, Tennessee and is also referred to as the Old Hickory plant.

[6] Mary Jo Anderson, an in-house counsel and a credible witness, drafted the Company's corporate-wide health care plan provisions. As in the earlier case, there was no dispute as to her testimony that the Company's longstanding practice of maintaining a single set of benefit plans covering all of its employees and retirees was beneficial to the Company and its employees for economic, administrative and other reasons. (Tr. 540; Jt. Exh. 2 at 142-145.)

clerical, technical and office (CT&O) workers represented by Local 992. Local 992 represents P&M workers in one bargaining unit and CT&O workers in a separate unit. It has represented employees at the Richmond site for more than 50 years.[7] Local 992's executive committee meets with Richmond management twice a month to go over daily affairs and contract administration, while the CT&O and P&M Contract Committees meet with management during collective-bargaining negotiations.[8] The most recent collective-bargaining agreement (CBA) between the Company and Local 992 for the P&M unit is dated September 1, 2012. The most recent CBA entered into between the Company and Local 992 for the CT&O unit is dated October 1, 2000.[9]

The Company employs approximately 170 employees at Louisville. Approximately 96 of those employees are hourly production, maintenance, and clerical workers represented by Local 788.[10] One of Local 788's predecessors, the Neoprene Craftsmen's Union (NCU) represented production and maintenance employees at Louisville for approximately 50 years. In June 2002, the NCU voted to affiliate with PACE, and became PACE Local 5-2002. In April 2005, PACE merged with the United Steelworkers of America and became USW. In May 2010, the production and maintenance employees at Louisville voted to disaffiliate from the USW and form Local 788. Local 788 and its predecessor unions have represented employees at Louisville for more than 50 years.[11] The current CBA became effective on September 7, 2010.[12]

The Company employs approximately 240 employees at Nashville. Approximately 120 of those employees are hourly production and maintenance workers represented by Local 593. Local 593 has represented production and maintenance employees at Nashville for more than 50 years.[13] The most recent CBAs are dated April 7, 1976, February 13, 1987, and July 25, 1995. The 1995 CBA is still in effect.[14]

B. The Company's Corporate-Wide Benefit Plans Generally

At all relevant times, the Company has maintained one set of corporate-wide employee benefit plans for all of its employees within the United States, whether they are unionized, non-represented, or in managerial positions. The Company's stated purposes for maintaining a single set of corporatewide plans are: (1) to ensure that all employees, regardless of location, job title of union affiliation, receive the same benefits based on years of service and other criteria; (2) to foster easier plan administration and compliance with applicable legal requirements; and (3) provide significant economies of scale that allow the Company to offer plan participants lower premiums and better service.[15]

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[7] Jt. Exh. 4 at ¶2.
[8] Jt. Exh. 2 at 33–34.
[9] Jt. Exh. 19–20.
[10] Jt. Exh. 4 at ¶ 3.
[11] Subsequent references to Local 788 include the actions or inaction of its predecessors. (Id. at ¶ 4.)
[12] Excerpts from the Louisville CBAs, dated March 22, 1974, March 22, 1976, March 22, 1978, April 28, 1980, April 30, 1982, May 1, 1985, April17, 1989, June 12, 1992, May 25, 1994, June 13,1997, June 1, 2006 and September 7, 2010, were received as Jt. Exh. 30(a), 6(d), 30(b)-(f), 9(a) and 9(b), 30(g)-(h), and 31, respectively.
[13] Jt. Exh. 4 at ¶¶ 5, 61.
[14] Jt. Exhs. 6(c), 7 and 8.
[15] Jt. Exh. 2 at 143; Jt. Exh. 4 at ¶¶ 6–7, 12.

The Company has frequently communicated to Locals 593, 788 and 992 that employees and/or retirees from a single worksite would not achieve the same level of benefits at the same rates if their labor representatives negotiated for benefit plans that were limited to represented employees and/or retirees from a single worksite.[16]

Each of the Company's corporate-wide benefit plans contains a "reservation of rights" provision stating that the Company retains the right to change or modify the plans at its discretion.[17] Consistent with those provisions, the CBAs applicable to the Company's union-represented worksites all contain an "Industrial Relations Plans and Practices" (IRP&P) provision. Section 1 of the IRP&P provision contains a list of corporate-wide benefit plans available to employees at the worksite. The IRP&P provision grants the Company the right to make changes to the listed plans, subject to the certain restrictions set forth in the IRP&P provision and the benefit plan documents themselves.[18]

The Company assesses its benefit plans and plan offerings on an ongoing basis. When it determines the need to make adjustments, it has modified the plans or plan offerings. Before implementing modifications, however, the Company typically meets with each Union at its worksite. At these meetings, the Company notifies the Union of its intention to make the modifications, discusses and provides information about the changes, and usually answers questions about the modifications.[19]

Information concerning changes to benefits is provided to company employees, retirees, and other benefit plan participants in a variety of ways. Specifically, company employees, retirees, as well as the Unions, have been notified of changes to the Company's corporate-wide benefit plans through publications such as "Plain Talk" and "Extensions" magazines, "Benefit Bulletins," "BeneFlex Guides," "Benefit Highlights," "Retiree Health Care Highlights," "Health Care Communication to Employees," "Employee Information Bulletins," "Plant Communications," benefits Q&As, and benefit-related PowerPoint presentations, as well as through notices of material modifications, letters, and emails sent to employees and/or retirees. In recent years, company employees, retirees, and Unions have also been directed to company-sponsored websites for more information concerning benefits provided through the Company's corporatewide benefit plans and changes affecting those benefits.[20]

C. DAP, MEDCAP, and BeneFlex

1. DAP

The two benefit plans at issue in this case, the Dental Assistance Plan (DAP) and Medical Care Assistance Program (MEDCAP), are corporate-wide benefit plans. DAP was created in

[16] Except where a specific page is identified, record evidence is referred to by the last 4 digits of its Bates-stamped designation, thus dropping the preceding "DUP000." (Jt. Exh. 4 at ¶ 8; R. Exh. 3 at 8822.)

[17] Jt. Exh. 5(a)-(c) are excerpts from the Company's various corporatewide benefit plan documents setting forth examples of the reservation of rights language in each plan. (Id. at ¶ 9.)

[18] Id. at ¶ 10.

[19] Id. at ¶¶ 11, 14, 27.

[20] Id. at ¶ 13.

early 1976, and offered nationwide to eligible employees and retirees. The DAP Plan Document and its accompanying Summary Plan Description (SPD) both contained reservation of rights clauses. Subsequent versions of the DAP Plan Document and SPD since 1976 have contained virtually the same reservation of rights provision recognizing the Company's right to suspend, modify, or terminate DAP at any time.[21]

At worksites where employees were represented by a union, such as at Richmond, Louisville, and Nashville, the Company presented the Unions with the DAP Plan Document, and offered union-represented employees the opportunity to participate in DAP on the same basis as nonunion employees, subject to the terms of the DAP Plan Document.[22]

After bargaining over member participation, unions at the Company's represented sites agreed to have their members participate in DAP. DAP was then added to the list of corporate-wide benefit plans listed in the IRP&P provisions at the Richmond, Louisville, and Nashville sites, as well as other employee-represented sites.[23]

2. MEDCAP

On January 1, 1983, the Company offered MEDCAP as a healthcare plan option to its employees nationwide. Like DAP, the MEDCAP Plan Document and its accompanying SPD both contained reservation of rights clauses. All iterations of the MEDCAP Plan Document and SPD since 1983 have contained the same reservation of rights provision.[24]

Initially, MEDCAP provided benefits to eligible employees and retirees. MEDCAP was initially referenced in the Louisville and Nashville CBAs, but has never been expressly referenced in any of the Richmond CBAs. The CBAs covering the Richmond CT&O and P&M bargaining units from 1984 through 1991 contained a Hospital and Medical-Surgical (HMS) coverage provision expressly referencing Blue Cross of Virginia and Blue Shield of Virginia.[25]

Article XIX of the MEDCAP Plan Document describes the Company's rights and authority as Plan Administrator.[26] Article XVI states that "premiums under this Program during each Plan Year will be determined by the Company." Article XX states that the "Company reserves the right to amend any provision of this Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company." The MEDCAP SPD also addresses the Company's right to suspend, modify, or terminate the plan.[27]

Under MEDCAP, participants were required to submit claims within two years from the date of service. The reimbursement process under the MEDCAP SPD required submission of certain information, including a description of the service provided, dates of service, diagnostic

[21] Id. at ¶¶ 15-16.
[22] Id. at ¶¶ 17, 22.
[23] Id. at ¶¶ 18, 63; Jt. Exhs. 6(a)-(d); R. Exh. 3 at 8309, 8311; R. Exh. 8.
[24] Id. at ¶ 19; Jt. Exhs. 1 at ¶¶ 6–7, 12(b) at ¶ 21.
[25] Id. at ¶ 20.
[26] Jt. Exh. 1 at ¶ 8.
[27] Id. at ¶9; Jt. Exh. 12(b) at 120.

and treatment codes, proof of payment. Participants have a right to appeal to the Company about claims issues.[28]

Medicare-eligible retirees (MER or MERs) had an annual stop-loss provision, in which once the MER "reach[ed] the individual or family stop-loss, the Medical Plan covers 100% of R&C or, if applicable the Network Negotiated Rate, for the remainder of the Plan Year." Additionally, under MEDCAP, MERs could receive a maximum $1.5 million "for all covered medical expenses incurred on account of any one person in any one Plan Year."[29]

3. Unions Agreed to Participate in Plans

In the past, the Company's Unions, including Locals 593, 788 and 992, have had the option to decline to participate in the Company's corporatewide plans, and to propose alternative, site-specific plans in lieu of the Company's corporate-wide plans. Some unions, including Local 788, have, on occasion, proposed site-specific benefit plans.[30]

Local 992 agreed to the Company's DAP proposal in 1976 after discussions over its inclusion of a reservation of rights provision. DAP was then included as an additional item under the CBA's IRP&P provision.[31] After six years of discussions, Local 992 agreed to participate in MEDCAP in 1986 after expressing its objections to inclusion of reservation of rights language in the plan document.[32]

Local 788's predecessor agreed to have its members participate in DAP, and it was added to the list of IRP&P plans in the 1976 CBA. In 1984, Local 788's predecessor also agreed to have its members participate in MEDCAP in 1984, and MEDCAP was added to the HMS provision of the parties' 1985 CBA.[33]

DAP was added to the list of IRP&P plans in the 1976 CBA at Nashville. Local 593 agreed to participate in MEDCAP in 1983, subject to the terms of the MEDCAP Plan Documents. The parties' agreement was memorialized in a supplemental agreement executed on December 9, 1983 and effective April 1, 1984.[34] The current CBA was signed in 1995; MEDCAP and DAP are not included or referenced in that CBA.[35]

4. BeneFlex

In 1991, the Company created a new cafeteria-style benefits plan called the BeneFlex Flexible Benefits Plan (BeneFlex). Within BeneFlex are several sub-plans providing various types of benefits, including medical and dental benefits. BeneFlex was presented to the Unions in

[28] Jt. Exh. 10 at 206-208.
[29] Jt. Exh. 10 at 178-179.
[30] Id. at ¶ 25.
[31] R. Exh. 3 at 8309, 8311; R. Exh. 8 at 8260.
[32] R. Exh. 3 at 8332, 8364, 8371, 8393–8402, 84336–8437, 8450–8452, 8499–8501, 8504; R. Exh. 6(a)-(b); R. Exhs. 5(a) at 17011-17012, 5(b) at 16358.
[33] Id. at ¶ 74-75; Jt. Exhs. 6(d), 30(e).
[34] Jt. Exh. 4 at ¶¶¶ 4, 17, 19, 63–64, 75; Jt. Exhs. 6(d), 27.
[35] Jt. Exh. 8.

the early 1990s at worksites where employees were represented by a union. The Company offered union-represented employees the opportunity to participate in BeneFlex on the same basis as nonunion employees, subject to the terms of the BeneFlex documents.[36]

Local 992 agreed to BeneFlex in 1993;[37] Locals 593 and 788 agreed to BeneFlex in 1994.[38] In furtherance of the changes, the HMS provision was deleted from the Richmond and Nashville CBAs at the same time that a new IRP&P provision, "Section 3" addressing BeneFlex, was added to those agreements.[39] The HMS provision was modified in the 1994 Louisville CBA to add BeneFlex and delete the other medical plans formerly referenced in that provision.[40]

Once a union accepted BeneFlex, and its employee members began receiving medical and dental benefits under the BeneFlex Medical Assistance Plan and BeneFlex DAP, they became ineligible to continue receiving benefits through MEDCAP and the DAP. Retirees and eligible dependants remained eligible to receive medical and dental benefits through MEDCAP and DAP, however, so long as they continued to meet the eligibility criteria in the respective plans. The medical and dental benefits offered through BeneFlex mirror those under MEDCAP and DAP. Changes made to the BeneFlex medical and dental plans have been carried over and implemented with respect to the mirror versions of MEDCAP and DAP.[41]

Employees represented by Locals 593, 788, and/or 992 currently receive medical and dental benefits under BeneFlex. Eligible pensioners who have retired from the worksites represented by Locals 593, 788 or 992, along with their eligible dependents, currently receive medical benefits through MEDCAP and dental benefits through DAP.[42] Prior to 2013, MERs simply had to submit a form expressing their intention to continue utilizing the Company's insurance in retirement, with premiums deducted from their pension payments. As was the case during active service, retirees did not have to submit any documentation if they refrained from making any changes in coverage during annual enrollment periods.[43]

D. Changes to DAP and MEDCAP Prior to 2013

The Company announced and made numerous changes nationwide to DAP and/or MEDCAP during the period from 1976 to 2012.[44] Historically, the Company has announced changes to its corporatewide benefit plans, including DAP and MEDCAP, in the late summer or fall of each year, prior the "open enrollment" period in which employees and retirees select their benefits options for the then-upcoming year. The announced changes have typically gone into

[36] Jt. Exh. 4 at ¶ 21.

[37] Local 992's acquiescence came after two years of negotiations. (R. Exh. 3 at 8616–8619, 8691–8693.)

[38] BeneFlex was previously offered to Local 593, but not accepted until 1994; (Jt. Exh. 25 at 1100–1104, 1118–1120; Jt. Exh. 9(b) at 22; Tr. 371.)

[39] Jt. Exh. 4 at ¶ 22; Jt. Exh. 7–8; R. Exh. 6(a)-(b), 7(a)-(b).

[40] Id. at ¶ 22; Jt. Exh. 9(a)-(b).

[41] Id. at ¶ 23.

[42] Id. at ¶ 24.

[43] This finding is based on the credible and unrefuted testimony of James Palmore, vice president of Local 992. (Tr. 113, 125.)

[44] Jt. Exh. 4 at ¶¶ 26, 50; Jt. Exh. 10(a)-(b); R. Exh. 11(a)-(b).

effect on January 15 of the following year, which is the beginning of the benefit plan year for DAP and MEDCAP, as well as other corporate-wide plans.[45]

Before these modifications took effect, the Company typically met with each union at its worksite. At these meetings, the Company notified the union of its intention to make the modifications, provided benefit-related publications and other information, and discussed and answered questions about the modifications.[46]

The Company did not, however, usually seek the agreement of Locals 593, 788 and 992 before implementing the changes.[47] The Company often informed Locals 593, 788, and 992 that it would not bargain over specific changes to its corporatewide plans because those plans also provided benefits to participants not represented by a union. However, while the Company has informed the Unions that it would not bargain over changes to corporate-wide plans, it has consistently expressed a willingness to bargain over employee benefits and consider any site-specific benefit plan proposals that Locals 593, 788, and 992 wished to make.[48]

1. Local 992's requests for information and bargaining prior to 2013

The Company has implemented numerous changes to its benefit plans since 1987. On at least 50 occasions, the Company announced changes to healthcare premiums, deductibles, copays and annual plan limits, benefit options, terms of coverage, and participant eligibility relating to working spouses and dependents.[49]

Since at least 1988, Local 992 has requested information relating to many of those unilateral changes in benefits, including premiums, cost estimates and related data, and available insurance carriers. In numerous instances when it agreed that the information was relevant, the Company agreed to the request.[50]

Some of the unilateral changes increased coverage. In 2004, for example, the Company added a network of 58,000 dentists.[51] That same year, the Company announced coverage eligibility in its corporatewide benefit plans for an additional category of dependents—the same-sex domestic partners of employees.[52] Mostly, however, the Company's unilateral changes tended to reduce or restrict benefits.

On April 12, 1988, the Company reiterated the distinction between local and corporate-wide benefit plans. The Union had requested the Company bargain over scheduled changes to DAP. The Company refused, but noted that the plant manager could replace a corporate-wide

[45] Jt. Exh. 4 at ¶ 27.
[46] Id. at ¶¶ 27, 51, 62, 73; Jt. Exhs. 21–22, 25–26, 32–33; R. Exh. 3 at 8511, 8691.
[47] Id. at ¶ 28; R. Exh. 11(a); Jt. Exh. 10(a).
[48] Id. at ¶ 29; Jt. Exh. 25 at 1031-1032, 1034; R. Exh. 3 at 8308, 8570, 8822.
[49] R. Exh. 11.
[50] GC Exh. 2 at 15270, 15377–15378; GC Exh. 6 at 18151–18153, 18157–18158; GC Exh. 8 at 154–15457; GC Exh. 14 at 17850–17851; GC Exh. 36 at 5274; GC Exh. 47 at 8584; R Exh. 3 at 8719–8720, 8840–8841, 8930–8931; R. Exh. 11 at 8847.
[51] R. Exh. 3 at 8932.
[52] R. Exh. 3 at 8955–8956.

plan with a local plan, which it would consider. The Company reiterated the distinction between local and corporate-wide health plans and, when Local 992 expressed an interest in proposing changes, the Company reiterated that it would not bargain over local changes.[53]

On October 15, 2002, the Company announced that it would impose an annual limitation, or cap, on its contributions to retiree healthcare. The Company also announced an increase in the share of healthcare costs to be borne by retirees.[54] Two weeks later, the Company announced that retirees would begin paying a premium for certain types of dental work.[55]

Finally, some changes amounted to a coordination of benefits that neither enhanced nor reduced them. In 1993, the Company expanded medical precertification to 14 procedures. Also, since employees were to receive medical and dental coverage through BeneFlex, the Company proposed, and the Union agreed, to delete the HMS provision and replace it with a provision incorporating BeneFlex into section 3 of the IRPP article in the CBA.[56]

Between 2007 and 2012, Local 992 responded to the changes by submitting numerous information requests regarding benefit changes to the Company for verification. The requests related to active employees and retirees. The Company typically provided the information and Local 992 acquiesced to favorable changes.[57]

Local 992 has, at times, insisted on bargaining over specific changes to its corporate-wide plans. The parties discussed and bargained over two major Company's proposals to change health care coverage from 1985 to 1987. These included company proposals to amend the CBA to include a management rights clause and a new HMS provision.[58] Local 992 also requested bargaining in 1987,[59] 1991, 1992 and 1993,[60] 1995,[61] and 1997,[62] 1998[63] and 1999[64] regarding premium increases, changes in providers, mergers of health providers and other announced benefit changes, and the Company occasionally agreed to bargain or, at least, discuss the details.[65] Some changes, such as Local 992's acceptance of the Company's offer to move employees to coverage under BeneFlex, were more significant than others.[66]

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[53] GC Exh. 6 at 18155–18156.

[54] R. Exh. 11 at 2443.

[55] R. Exh. 3 at 8861–8863.

[56] R. Exh. 3 at 8693; R. Exh. 7(a) at 17129 and 7(b) at 16419.

[57] Palmore and Donny Irvin, Local 992's treasurer, provided credible testimony regarding Local 992's practice of requesting information. (Tr. 34-35, 122; Jt. Exh. 2 at 38.)

[58] R. Exh. 3 at 8387–8394, 8398–-8399, 8434, 8437, 8450–8452, 8459, 8471–8476, 8480–-8482, 8487, 8492, 8499, 8502–8503.

[59] GC Exh. 2 at 3–4.

[60] R. Exh. 4 at 9072–9074.

[61] GC Exh. 4 at 15377–15378.

[62] GC Exh. 8 at 15456–15457; R. Exh. 3 at 8737.

[63] R. Exh. 3 at 8795.

[64] R. Exh. 3 at 8822–8823.

[65] Jt. Exh. 4 at ¶ 30; Jt. Exh. 3 at 249–250; GC Exh. 2 at 15277–15278; GC Exh. 3 at 15265, 15270; GC Exh. 8 at 15456–-15457; R. Exh. 3 at 8736–8737, 8822–8823; R. Exh. 4 at 9072–9074.

[66] My finding at fn. 56 of the decision in Case 5–CA–33461 regarding the consistency of testimony by Anderson and Irvin as to events leading to bargaining unit members enrolling in BeneFlex is consistent with their testimony in this case. (Jt. Exh. 2 at 65–68, 147–149.)

Until 2007, however, Local 992 never filed a grievance or unfair labor practice charge challenging the Company's right to make unilateral changes to either DAP or MEDCAP. The 2007 unfair labor practice related to Company announced changes in August 2006 to seven of its corporatewide employee benefit plans, including DAP and MEDCAP. Specifically, the Company amended the eligibility provisions of DAP and MEDCAP to clarify that employees hired after January 1, 2007 would not be eligible, upon retirement, to participate in DAP and MEDCAP. DAP and MEDCAP Plan Documents were amended consistent with the announced changes, and the changes to DAP and MEDCAP were implemented on January 1, 2007 (2007 Benefit changes). The Company announced and implemented the 2007 Benefit changes without first bargaining with Locals 593, 788, or 992.[67]

On February 16, 2007, Local 992 filed an unfair labor practice charge alleging the Company violated Section 8(a)(5) and (1) of the Act without first bargaining over the 2007 Benefit changes. Region 5 issued a complaint (Case 5–CA–33461) and I conducted a hearing on May 23-24, 2011.[68] On August 22, 2011, I issued a decision concluding that the Company's refusal to bargain over the 2007 changes violated Section 8(a)(5 and (1) of the Act.[69]

2. Local 788's request for information and bargaining prior to 2013

At Louisville, the Company had a longstanding practice of unilateral changes to employee and retiree health and dental care benefits. Local 788's predecessor unions responded in several instances by demanding bargaining. Local 788 demands to bargain in 1996 and 1999,[70] 2001 through 2004,[71] and 2009[72] related to premium increases, cost sharing, wellness care, and benefits for new employees. The Company agreed to bargain in some instances,[73] but typically responded that it was entitled to make such changes under the CBA and Plan Documents.[74] In one notable instance, in 2000, the Company and Local 788's predecessor entered into a memorandum of understanding after the Company attempted to a incorporate a long-term care plan into BeneFlex that would have been administered by a third party.[75]

The Louisville Unions filed several charges contesting the Company's right to make unilateral changes to premiums, copays, stop-losses, prescription coverage and payments, health insurance options, and dependent coverage between 2001 and 2007.[76]

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[67] Jt. Exh. 1 at 5, 16-20, 23-24; Jt. Exh. 4 at ¶ 32; GC Exh. 50.

[68] The parties retained the original exhibit numbers from Case 5–CA–33461, and any new exhibits entered in this case began sequentially with the last exhibit number in that case. (Id. at ¶ 34.)

[69] Case 5–CA–-33461 is pending before the Board on exceptions. (Id. at ¶ 33.) Given the difference in the materiality of the changes involved in the two cases and the extensive stipulations of fact between the party, I decline the General Counsel's request to apply the principles of issue preclusion.

[70] Jt. Exh. 32 at 818, 870.

[71] GC Exh. 58, 60-64.

[72] Jt. Exh. 32 at 1000.

[73] Jt. Exh. 32 at 895.

[74] GC Exh. 25, 55, 57.

[75] Jt. Exh. 32 at 885.

[76] Evidence of the previous charges was received without objection. (GC Exh. 51A–H.) In response, the Company offered and I received over objection by the General Counsel and the Unions, copies of the

In addition to demanding bargaining and filing unfair labor practices over changes to health benefits, the Louisville Unions frequently insisted on being provided with relevant information before the Company implemented changes in health care cost increases and participating providers for employees and retirees. Typical examples in 1994,[77] 2000[78] and 2001[79] related to lists of participating health care providers, costs, and prescription coverage. The Company generally provided the information.[80]

3. Local 593's request for information and bargaining prior to 2013

At the Nashville plant, the Company also had a longstanding practice of unilateral changes to employee and retiree health and dental care benefits. The Company increased premiums for active employees and retirees in 1993,[81] 1998,[82] 2001 to 2008,[83] and 2012.[84] It either added or modified deductibles in 2002[85] and 2008 to 2012.[86] Employee and retiree coverage provisions were changed in 1993,[87] 2003,[88] and 2008 to 2012.[89] Eligibility, dependent and prescription coverage was modified in 2001and 2004,[90] and 2010 to 2012.[91]

Several notable changes augmented coverage. In 2004, the Company added 58,000 dentists to the DAP provider list.[92] In 2005, the plan eligibility was modified to make benefits available to same-sex partners.[93]

In several instances, however, Local 593 responded to announced changes by demanding bargaining and the Company agreed. In 1984, the Company responded favorably to Local 593's request for information and demand to bargain over a proposed increase in premiums, and enrollment and claims forms.[94] In one notable instance in 1987, the Company responded to Local

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stipulations resulting from those charges. (R. Exh. 29; Tr. 438-455.) In conjunction with the inconsistent testimony of Gregory Lowman, Local 788's president, they establish that the 2007 charge was the only one filed contesting changes to retiree benefits under MEDCAP and DAP, while the previous charges related to employee benefit changes to BeneFlex. (Tr. 254-255, 290, 307, 309, 219, 324-325.)

[77] Jt. Exh. 32 at 803.

[78] GC Exh. 54 at 1.

[79] GC Exh. 56 at 1.

[80] Jt. Exh. 32 at 807, 871–872, 904–905, 909.

[81] Jt. Exh. 2 at 89, 179, 182; R. Exh. 2 at 9080; R. Exh. 11 at 713.

[82] R. Exh. 11 at 1500–1501.

[83] Jt. Exh. 2 at 80, 82, 85, 185-187; Jt. Exh. 3 at 266; Jt. Exh. 10(f) at 175–176; R. Exh. 3 at 8950; R. Exh. 11 at 1058, 1134, 1287, 2445.

[84] Jt. Exh. 10(k) at 59.

[85] Jt. Exh. 2 at 189; R. Exh. 11 at 2155.

[86] Jt. Exh. 10(i) at 40-42; Jt. Exh. 10(f) at 200; Jt. Exh. 10(h) at 37; Jt. Exh. 10(k) at 60-61.

[87] R. Exh. 11 at 676.

[88] Jt. Exh. 11 at 2451.

[89] Jt. Exhs. 10(k) at 59–62, 10(e) at 24, 10(g) at 141–142; 10(h) at 37; 10(i) at 41–46; 10(j) at 49–57.

[90] Jt. Exh. 2 at 192-193.

[91] Jt. Exh. 10(k) at 59–62.

[92] R Exh. 3 at 8932.

[93] Jt. Exh. 2 at 191; Jt. Exh. 3 at 206.

[94] Jt. Exh. 25 at 1026–1027.

593's proposal to change insurance carriers by stating that such a change required careful consideration as to the costs, benefit levels and claims services to participants.[95] In another instance, on January 6, 1993, the Company recognized its bargaining obligation regarding the proportionate share of plan costs to be borne by the Company and employees.[96]

In other instances, the Company spurned Local 593's objections to changes to corporate-wide health and dental care benefits. In 1993 and 1994, Local 593 objected to Company changes to MEDCAP, but the Company asserted its rights to make the changes.[97] The Company did, however, bargain with Local 593 over the elimination of Prucare, a local health plan, at Nashvile.[98] The Company took similar actions over Local 593's objections in 1994 and 1997.[99]

With respect to changes in insurers, coverage, and increasing premiums and deductibles to MEDCAP and BeneFlex, Local 593 consistently requested an explanation and details regarding enrollment, eligibility and the portions of the cost to be borne by the Company, employees and retirees[100] between 1986 and 1992, 2000, 2002, 2006, 2008, and 2010. The Company generally provided the information.[101]

E. The 2013 Changes to the Dental Plan and MEDCAP and Local 992 Charge

In 2012, the Company decided to make additional changes to retiree medical and dental coverage for MERs and their covered dependants, effective January 1, 2013 (2013 Changes). More specifically, the Company decided to provide secondary medical and dental benefits to its MERs through a Health Reimbursement Agreement (HRA). On January 1 of each year, beginning January 1, 2013, each Medicare-eligible participant in MEDCAP and DAP would have his or her HRA account credited annually with $1,200 for medical benefits and $200 for dental benefits. The retiree's Medicare eligible spouse or partner would have the same amounts added to the HRA. The HRA proceeds would then be available to purchase medical and dental insurance on the open market through a third party broker. Unused amounts would roll over and be available to use in subsequent years. MEDCAP and DAP participants who became Medicare-eligible during the calendar year would be credited with a prorated contribution for that year and credited with the full contribution in subsequent years.[102]

Pursuant to the 2013 Changes, MERs would enroll in coverage of their choice within the options provided under MEDCAP and DAP, as amended. Enrollment would take place through a third-party broker, Extend Health, which would assist retirees in selecting an insurance company and plan. Extend Health is a separate entity that is neither owned nor operated by the

[95] Id. at 1033–1035.
[96] R. Exh. 4 at 9075.
[97] Jt. Exh. 25 at 1161.
[98] Id. at 1158–1161.
[99] Id. at 1182, 1566.
[100] The credible testimony of Todd White, Local 593's president, regarding Local 593's customary practice is corroborated by numerous Executive Committee notes. (Tr. 260-261; Jt. Exh. 25 at 2.)
[101] Jt. Exh. 25 at 1031–1032, 1051, 1073–1074, 1102, 1119, 1155, 1236, 1240, 1293, 1327, 1329.
[102] Jt. Exh. 4 at ¶ 35.

Company.[103] The 2013 changes do not, however, apply to retirees and their covered dependants until they become eligible for Medicare. Retirees and covered dependents not yet eligible for Medicare would continue receiving medical and dental coverage under MEDCAP and DAP under the same terms as existed prior to the implementation of the 2013 changes, until they reach age 65 or become eligible for Medicare due to a disability.[104]

On August 15, 2012, the Company announced the 2013 changes: MERs would have until December 31, 2012, to choose supplemental coverage from among 75 insurance carriers. The failure to do so would result in the irrevocable declination of coverage. The Company also provided information about the changes on its website. The information included details about the new coverage per individual – fixed at $1200 for health care and $200 for dental care – and how to contact Extend Health.[105] However, the Company had no information as to the type of coverage that would actually be made available to its MERs or the cost of premiums.[106]

While Local 788 got advanced notice of the 2013 changes,[107] the changes were implemented unilaterally without bargaining with any unions, including Locals 573, 788, and 992.[108] They applied corporate-wide and, according to the Company, were intended to (a) offer MERs greater choice in health care plans to supplement their Medicare coverage; (b) provide greater personal flexibility in the selection of benefit plans, allowing a MERs and their spouses, partners or dependants to choose different plans; (c) provide the possibility of savings in total out-of-pocket health care expenses depending on upon the plans selected; and (d) provide the Company with cost stability and a simplification of plan administration. The 2013 Changes were effectuated through amendments to the DAP and MEDCAP Plan Documents.[109]

Company officials met with Local 992 on August 15, 2012, to discuss the 2013 Changes and answer related questions.[110] Retirees were informed two days later that educational sessions would be conducted in August and September 2012 at various locations around the country, during which the retirees would receive detailed information about the 2013 Changes and how to enroll in the available health care options through Extend Health.[111]

Following the announced changes, Local 992 requested information on at least five occasions from the Company, including a list of providers, plan documentation and dependent coverage. Bruce Harris, the Company's labor relations manager at Richmond, told Donny Irvin, Local 992's treasurer, that there was no such list.[112]

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[103] Id. at ¶¶ 36–37.
[104] Id. at ¶ 39.
[105] Id. at ¶¶ 38, 53, 66, 77; Jt. Exh. 11(a)-(g).
[106] The consistent testimony of Company and Union witnesses reveals that the Company did not know what benefits would actually be provided to employees. (Tr. 37, 177, 187–188, 210, 237–238, 263, 293, 332–333, 380–383, 393, 411, 417, 42–-428, 495, 540.)
[107] Lowman was told of the changes a few days earlier. (Tr. 285–-287.) Todd White, Local 593's president, however, did not find out until the day of the announcement. (Tr. 257-258.)
[108] Jt. Exh. 4 at ¶ 57, 68, 80.
[109] Id. at ¶ 41; Jt. Exh. 12(a)-(b).
[110] Id. at ¶ 54.
[111] Id. at ¶ 40.
[112] Bruce Harris, the Company's labor representative at Richmond, confirmed Irvin's credible

Locals 593, 788, and 992 also objected to the 2013 Changes, which are not arbitrable.[113] On October 2, 2012, Locals 992 and 788 wrote to the Company and demanded it rescind the changes.[114] The Company responded by letters, dated October 19 and 22, 2012, and told them that it would not rescind the 2013 Changes because it believed it had no duty to bargain over the changes.[115] Local 593 responded three weeks later with a similar demand that the Company rescind the 2013 Changes. The Company rejected the Union's request later that day.[116]

F. Extend Health

1. The enrollment process

In August and September 2012, Extend Health mailed to MERs a "Getting Started Guide" and "Enrollment Guide, and conducted education sessions for potential enrollees.[117] The Guide provided information regarding available plans, listed concerns by MERs and stated that MERs would be guaranteed coverage during the first enrollment period. It also noted, however, that they might be rejected later for preexisting conditions if the selected insurance provider changed its terms of coverage.[118] Extend Health advised MERs to start this process three months before the 2013 Changes became effective.[119]

The Company and Extend Health produced education sessions in states where significant numbers of MERs resided. MERs were informed that they would be able to use their HRA allotments to choose medical and dental coverage from among approximately 75 insurance carriers through an Extend Health benefit advisor. Extend Health would continue to function as claims administrator and process all appeals. MERs were also advised that plan premiums were likely to increase each year and there was no guarantee MERs could continue seeing their current medical or dental providers.[120]

After receiving the information, MERs were required to make several telephone calls to Extend Health. MERs were asked to provide Extend Health benefit advisors with medical, Social

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testimony that the Company was no longer providing MERs with insurance coverage, but rather, cash to obtain coverage. (Tr. 30-32, 205–206.)

[113] The parties stipulated that there are no references to the DAP Plan or MEDCAP in any of the applicable CBAs and, therefore, the 2013 Changes are not arbitrable. (Jt. Exh. 4 at ¶¶ 60, 65, 76.)

[114] Id. at ¶¶ 55; Jt. Exh. 23, 34.

[115] Id. at ¶¶ 56, 78-79; Jt. Exh. 23-24, 34-35.

[116] Id. at ¶ 67; Jt. Exh. 28-29.

[117] Id. at ¶¶ 42-43; Jt. Exhs. 13(a)-(b), 14-15.

[118] Only during the initial enrollment period were MERs guaranteed enrollment in a plan of their choice. (Id. at 8; Jt. Exh. 10(f) at 41.)

[119] Palmore, vice president of Local 992, provided credible and unrefuted testimony regarding the mechanics of the rollout of the 2013 changes. (Tr. 128.)

[120] Jt. Exh. 11(f) at 4, 15, 23–27, 31.

Security and Medicare information. Based upon that information, benefit advisors recommended certain insurance carriers. The new enrollment process took several months.[121]

Pursuant to the 2013 Changes, the Company began providing secondary medical and dental benefits to its MERs through a tax-exempt HRA, effective January 1, 2013. Extend Health implemented the 2013 Changes by compiling lists of insurance carriers and web-based summaries of insurance plans available to MERs who met certain criteria in May and June 2013.[122]

Based on information from third party vendors, the Company committed approximately $93,200,000 to MEDCAP/DAP HRA accounts for 2013. As of May 2013, the number of HRA joint and individual accounts established by eligible participants since January 2013 was 51,849. A joint account includes Company retirees, survivors, and/or dependents.[123]

2. The new terms and conditions of coverage

The new provisions applying to MERs are contained in Appendix B of the Plan Document. In addition to the provisions already described about the enrollment process and reimbursement through HRAs, the new plan requires MERs to submit to Extend Health all claims for expenses by March 31 following the plan year in which expenses are incurred. Extend Health, not the Company, administers the reimbursement and appeals processes for MERs, and requires them to submit more claim information than previously required.[124] Moreover, MERs no longer have any stop-loss or annual benefit maximum through the Company.[125]

Legal Analysis

Section 8(a)(5) of the Act makes it unlawful for an employer to make unilateral changes to benefits that are a mandatory subject of bargaining. *NLRB v.* Katz, 369 U.S. 736 (1962). An employer has a statutory duty to bargain over changes to retiree health care coverage where bargaining unit employees may be entitled to receive future retirement benefits as a term and condition of their employment. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1971). An employer, therefore, may not make unilateral changes to this subject of bargaining unless the union expresses a clear and unmistakable waiver of its right to bargain. *American Broadcasting Co*., 290 NLRB 86, 88 (1988*); California Pacific Medical Center*, 337 NLRB 910 (2002).

As in Case 5–CA–033461, the General Counsel once again alleges that the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally changed MEDCAP and DAP for a

[121] The credible testimony revealed that some MERs found the process easy, while others found it difficult to navigate, but it is not disputed that the process of initially enrolling in a new insurer through Extend Health took months. (Tr. 112–121, 350-351; Jt. Exh. 13(a) at 7–11.)

[122] The parties stipulated to receipt of examples of companies serving areas near each of the three plants that restricted coverage to males over the age of 65 who were not smokers, disabled or on kidney dialysis. (Jt. Exh. 4 at ¶¶ 44–46; Jt. Exhs. 16–18.)

[123] Id. at ¶¶ 47–48.

[124] Jt. Exh. 12(b) at 123-126.

[125] Jt. Exh. 10(g).

particular group of bargaining unit employees. In that case, I found the unilateral elimination of such coverage for new hires at the Richmond plant after January 1, 2007 to be a major change and a violation of Section 8(a)(5) and (1). In this case, the General Counsel alleges the same violation with respect to the Company's unilateral replacement of MEDCAP and DAP as secondary coverage for MERs with an annual $1,400 voucher payment toward the costs of coverage with an unknown carrier arranged through a third-party broker. It is further alleged that the change effectively severs the Company's obligation to bargain over health and dental coverage under the CBA, as the Union has no bargaining relationship with the Extend Health.

The Company again concedes that the changes were unilateral, but asserts that the 2013 Changes are fully consistent with the Unions' waivers and simply continue an uninterrupted 30-year past practice of similar changes. The Company also concedes that the 2013 Changes changed the manner in which MERs receive benefits, but asserts that they continue receiving benefits under MEDCAP and DAP, and the Company continues funding the benefits.

In its reply brief, the Company again stresses that the 2013 Changes altered the manner in which it provides benefits to MERs, but did not eliminate MEDCAP or DAP, discontinue benefits for MERs or preclude all future bargaining over retiree medical and dental coverage. The Company also contends that the General Counsel mischaracterized the bargaining history associated with past MEDCAP and DAP Changes, the past practice between the parties and the Unions failures to object to unilateral changes.

In its reply brief, the General Counsel renews its arguments that the Unions never negotiated over the inclusion of MEDCAP and DAP into the CBAs and, in any event, they are no longer referenced in any of the CBAs. Moreover, the Unions pursued bargaining over the years and did not waive their rights relating to MEDCAP and DAP. Lastly, the massive 2013 Changes are vastly different from past programmatic changes of increasing premiums and tinkering with eligibility formulas.

I. Express Waiver

The Company's waiver argument is premised on several grounds: (1) the Unions agreed to participate in DAP in 1976 on the condition that the Company retained the right to make future changes to the plan at its discretion; (2) the Unions agreed to participate in MEDCAP in the mid-1980's on the condition that the plan documents include a reservation of rights provision; and (3) the Company has made numerous, significant and uncontested unilateral changes to both plans virtually every year since 1986.

The General Counsel refuted the Company's waiver defenses on the following grounds: (1) the MEDCAP and DAP plan documents are not part of the CBAs; (2) the unilateral changes over the years have been relatively minor compared to the 2013 Changes; (3) the history of information requests constitute requests to bargain; (4) the waiver defense was aimed at the wrong union in Louisville; (5) the Unions bargained over prior changes affecting MEDCAP and DAP; (6) the 1986 Agreement at Richmond did not result in a waiver; (7) there are no bargaining notes relating to MEDCAP in Louisville or Nashville; (8) stipulations from prior cases evidence a history of union challenges to the Company's right to make unilateral changes; and (9) the Unions contested changes to BeneFlex.

A waiver occurs when a union "knowingly and voluntarily *relinquishes* its right to bargain about a matter. . . . [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Dept. of the Navy Marine Corps Logistics Base v. FLRA,* 962 F.2d 48, 57 (D.C. Cir.1992).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184–187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1984).

Pursuant to the CBAs, the Unions have a right to bargain on behalf of retirees, as well as active employees. It is undisputed that the MEDCAP and DAP Plan Documents contained management-rights clauses making them terminable by the Company. None of the CBAs, however, mention either plan. At Richmond, neither MEDCAP nor DAP were ever mentioned in the CBA; at Louisville and Nashville, the plans were once mentioned, but were subsequently removed from the CBAs.

The Board has been hesitant to imply waivers that are not explicitly mentioned within parties' collective-bargaining agreements. In *Southern Nuclear Operating Co*., 348 NLRB 1344 (2006), enfd. in part, remanded in part 524 F.3d 1350 (D.C. Cir. 2008), an employer unilaterally terminated full health care coverage and altered its life insurance payment policy for retirees. The Court of Appeals rejected the employer's contention that the unions incorporated the benefit plans' reservation of rights clauses into the contract based upon a "course of conduct" based on copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements. Id. at 1359. A similar result is found in *Mississippi Power Co.*, 332 NLRB 530 (2000), *enfd. in part* 284 F.3d 605 (5th Cir. 2002), where a management-rights provision contained in the employee benefits plan, but not the collective-bargaining agreement, was insufficient to establish a waiver of the union's bargaining rights.

The Board's recent decision in *Omaha World-Herald,* 357 NLRB No. 156, slip op. at 1-3 (2011) does not support a different result. In that case, the Board concluded that unilateral changes to employees' pension plans were lawful, but found that unilateral changes to their 401K savings plan were unlawful. As to the pension plan, it concluded that the union waived its right to bargain based on "an amalgam of factors." Under the contract, the employer was required to "advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested." However, the clause coexisted with other contract provisions referencing the plan, which included a reservation of rights clause, and expressly excluding changes to the plan from the grievance and arbitration procedure because the plans covered all employees, not just represented ones. Moreover, the union neither objected nor requested bargaining regarding a *similar*, prior unilateral change by the employer *during the term* of the contract. The prior change to the pension plan was a significant one – the removal of all employees under age 50 from the plan. Id. at 3.

Significantly, the Board also noted that its conclusion was not inconsistent with *Southern Nuclear Operating Co.* and other relevant decisions. Id. at fn. 8 (citing *Amoco Chemical Co.*, 328 NLRB 1220, 1222 fn. 6 (1999), enf. denied 217 F.3d 869 (D.C. Cir. 2000); *Register-Guard*, 339 NLRB 353, 356 (2003); and *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989)).

Moreover, the Board's opposite conclusion in *Omaha World-Herald,* that the employer's unilateral change to the 401(k) plan after the contract expired was unlawful, is also consistent with the facts here. The Board's rationale for the violation rested on well-settled precedent precluding waiver of the right to bargain where unilateral action relies on expired contract or referenced plan language, and there is no evidence that the parties intended that the waiver provision continue in force beyond the contract's expiration. Id. at 3-4 (citing *E. I. du Pont De Nemours, Louisville Works*, 355 NLRB No. 176, slip op. at 2 (2010); *Paul Mueller Co.*, 332 NLRB 312, 313 (2000); and *Ironton Publications*, 321 NLRB 1048, 1048 (1996)).

Notwithstanding the absence of an express waiver in the CBAs, the Company contends that the Unions waived their rights to bargain over these changes in clear and unmistakable terms, as evidenced by the bargaining history surrounding the CBAs and the Company's well-established past practice of unilaterally changing plan document terms.

Waiver of a statutory right may be evidenced by bargaining history, as the Company contends, but the Board requires the matter at issue to have been "fully discussed" and "consciously explored" during negotiations. *Davies Medical Center*, 303 NLRB 195, 204 (1991). Furthermore, the Company must demonstrate that the Unions consciously yielded or clearly and unmistakably waived their interests in the matter. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). Failure to mention a mandatory subject of bargaining does not constitute a waiver of the right to bargain; rather, the Board requires "a conscious relinquishment by the union, clearly intended and expressed." *Elizabethtown Water Co*., 234 NLRB 318, 320 (1978), citing *Perkins Machine Co*., 141 NLRB 98, 102 (1963).

In applying the "fully discussed" and "consciously explored" standard in *Davies*, the Board refused to find a waiver of the right to information even though the union had not previously requested information prior to preliminary bargaining sessions. In arriving at that conclusion, the Board noted the absence of evidence establishing that the Union clearly relinquished its statutory right to the production of relevant information. The Board followed a similar standard in *Reece Corp*., 294 NLRB 448 (1989). In that case, it found no waiver because the employer expressed a belief that the contract did not allow it to transfer work without bargaining. See also *General Electric Co*., 296 NLRB 844 (1989) (neither the language of the employer's bargaining notes or its subsequent bargaining history suggested that the Union clearly intended and expressly bargained away its statutory right).

At Richmond, there was discussion, but Local 992 never agreed to incorporate a management-rights provision into the contract. At Louisville and Nashville, there are no bargaining notes relating to the inclusion of a management-rights provision in MEDCAP or DAP. Moreover, Local 788 is not bound to any alleged waiver by its predecessor union even though it adopted the predecessor's CBA. See *Eugene Iovine, Inc.*, 356 NLRB No. 134 (2011);

NLRB v. Burns Int'l Servs., Inc., 406 U.S. 272, 284 n. 8 (1972); *American Seating*, 106 NLRB 250 (1953).

Based on the foregoing, the language of the CBAs, especially when construed in conjunction with the parties' past dealings and bargaining history, fail to reveal the existence of any express waivers by the Unions permitting the Company to unilaterally eliminate MEDCAP and DAP as the secondary coverage for MERs and replace them with an annual payment into an HSA to be administered entirely by a third party broker.

II. Implied Waiver

Notwithstanding the absence of an express waiver, the Company again advances several additional theories demonstrating that the Unions waived their objections to the unilateral replacement of MEDAP and DAP for MERs—a general waiver based on past practice and the existence of a longstanding practice as the continuation of the status quo. The General Counsel denies the applicability of these theories and relies on the argument that the changes were material and more substantial than any unilateral changes implemented over the past 20 years.

A. Waiver Based on Past Practice

The Company's alternative theory is premised on the concept that its 30 years of imposing unilateral changes to MEDCAP and DAP terms of coverage constitutes a waiver by all three Unions. A waiver may be inferred from extrinsic evidence of contract negotiations and/or past practice. *Mt. Clemons General Hospital*, 344 NLRB 450, 460 (2005). See also *Litton Microwave Cooking Products v. NLRB,* 868 F.2d 854, 858 (6th Cir. 1989) (waiver where management rights clause was included in contract and explicitly referred to layoffs and production methods, coupled with history of uncontested work relocation and layoffs); *California Pacific Medical Center*, 337 NLRB 910, 914 (2002) (waiver based on management rights clause giving employer the right to lay off employees whenever deemed necessary, again coupled with a history of uncontested actions and absent requests to bargain).

In *Mt. Clemons General* Hospital, supra at 460, an employer made unilateral changes to a tax shelter annuity program that downsized the program from five providers to one. The change was not explicitly authorized in the contract, but referenced only in a general waiver clause. As such, the Board found that clause insufficient to constitute an express waiver for specific terms not listed in the contract. Nevertheless, the Board recognized the existence of an implied waiver from the employer's 20-year record of making similar unilateral changes without any requests by the union to bargain over them.

In contrast to *Mt. Clemons, Litton* and *California Pacific*, there is a history of fluctuations in the bargaining relationship between all three Unions and the Company —unilateral changes without requests to bargain, as well as changes followed by requests for information and/or requests to bargain. The instances in which the Company unilaterally changed benefit terms without requests to bargain outnumber the instances in which the Union requested information or sought to bargain. Nevertheless, under the circumstances, the transactional history makes it unlikely that the Unions waived their rights to bargain over the elimination of retiree health benefits.

Moreover, *Mt. Clemons*, *Litton* and *California Pacific* did not include unilateral changes that substantially deviated from past practices. Both *Mt. Clemons* and *Litton* involved disputes arising from unilateral changes such as layoffs that the companies implemented frequently prior to the filing of charges. *Mt. Clemons* involved the downsizing of an annuity program, not its total and irrevocable termination. None of these changes strayed considerably from the companies' similar past practices, which they implemented openly and with the acquiescence of their respective unions.

B. Longstanding Practice as Continuation of the Status Quo

The Company also contends that the 2013 Changes were merely part of the status quo of a longstanding practice that spanned a 30-year period of unilateral changes to MEDCAP and DAP. The General Counsel again responds that these changes were scattered among numerous information requests over the years that constituted requests for bargaining and counter any semblance of a well-established past practice.

A unilateral change made pursuant to longstanding practice is essentially a continuation of the status quo and not a violation of Section 8(a)(5). *The Courier-Journal*, 342 NLRB 1093, 1095 (2004) (unilateral increase of health premium lawful where contract gave employer the right to modify or terminate the health care plan, coupled with a long history of similar unilateral changes).

Again, however, the Company failed to meet its burden in establishing that the Unions expressed a clear and unmistakable waiver of their rights to bargain. When the Company's history of unilateral changes to the health plan deductibles, premiums, eligibility and other terms are considered in conjunction with many Union requests for information, its past practice theory fails to establish a status quo that meets the requirements of *Courier-Journal*. Moreover, the Company's unilateral replacement of MEDCAP and DAP for MERs with a voucher plan is far from a continuation of the status quo.

C. Material Departure from Past Practice

The Company's reliance on a long history of changes to MEDCAP and DAP is also undermined by the materiality of the 2013 changes. An employer violates Section 8(a)(5) if the unilateral change at issue constitutes a material departure from well-established past practice. *Caterpillar, Inc*., 355 NLRB 521, 523 (2010), enfd. mem. _ F.3d _, 2011 WL 2555757 (D.C. Cir. May 31, 2011)

In *Caterpillar*, the Board found that an employer's unilateral implementation of a generic-first prescription drugs program violated Section 8(a)(5). In addition to rejecting the employer's contention that it had a longstanding practice of unilaterally implementing changes to its health care plan, there was no "thread of similarity running through and linking the several types of change at issue." The Board distinguished three types of past change—preauthorization requirements, drug quantity limits and step therapies—as dissimilar to each other, as well as generic-first prescriptions. Moreover, the implementation of "generic first" represented a material departure from that past practice, as past changes were limited in scope. Lastly, the

union's acquiescence to past unilateral changes did "not operate as a waiver of its right to bargain over such changes for all time." Id. at 521–523. (quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987)).

In contrast to the employers in *Mt. Clemons General Hospital, Litton*, and *Courier-Journal*, the Company has failed to establish that the Unions waived their rights to bargain based on the bargaining history and past practice. Furthermore, based on the *Caterpillar* holding, the Company's termination of MEDCAP and DAP as secondary insurance to MERs, replacing them with a permanent annual voucher payment and referring MERs to a third party to procure some sort of health care and dental coverage, constituted a material departure from any past practices that Company may have established. Instead of simply changing premium rates, deductibles, eligibility and scope of coverage, the 2013 Changes removed negotiations and discussions of potential health and dental insurance plans from the bargaining table.

The Company stresses that the previous $1,500,000 annual benefit maximum, a major bone of contention, was not eliminated because, in theory, there might be an insurance provider on Extend Health's list willing to provide such coverage. Moreover, the new procedure allows each retiree to shop for the coverage most beneficial to him or her, as opposed to being locked into one negotiated on behalf of thousands of beneficiaries. While such arguments are plausible, it is far from certain that an individual will be able to procure as beneficial a coverage as could be negotiated by an employer on behalf of thousands of beneficiaries. The answers presumably lie in the information request and bargaining process that was sidestepped here.

Accordingly, the Company failed to carry its burden in establishing an implied waiver through its bargaining history or past practice, and its elimination of replacement of MEDCAP and DAP with an annual $1400 voucher payment to a third party insurance broker constitutes a material departure from past practice.

III. Equitable Estoppel

The Company also argues that the Union is equitably estopped from demanding to bargain. A union's constant acquiescence to an employer's unilateral action for sustained periods of time can equitably estop a union from demanding bargaining on that subject. *Manitowec Ice Co.*, 344 NLRB 1222 (2005); *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961). The General Counsel contends, however, that a union's failure to request bargaining on a topic does not constitute a clear and unmistakable waiver of its right to bargain on that topic at a later time. See *FirstEnergy Generation Corp.,* 358 NLRB No. 96, slip op. at 1 (2012), citing *Caterpillar, Inc.*, supra at 523 (union's silent acquiescence to prior changes in retiree benefits does not surrender future rights to bargain over changes); see also *Brewers and Malsters*, 342 NLRB No. 49 (2004), enfd. 414 F.3d 36, 45 (D.C. Cir. 2005) (union's waiver of right to bargain over prior changes does not waive right to bargain over future changes).

Unlike the union in *Manitowoc*, which was equitably estopped from bargaining due to a history of unilateral changes without bargaining requests, information requests, or other objections from the union, the Unions here made numerous information requests throughout the years, to which the Company typically acquiesced. Information requests sent to employers constitute requests for bargaining. *Eldorado*, Inc., 335 NLRB 952, 954 (2001). Moreover, the

Company's bargaining notes indicate that the Company had no intention of terminating MEDCAP and DAP and replacing them with an annual voucher payment.

The record establishes that the Company itself considered unilateral changes to the status quo insofar as they occurred within the framework of an existing future retirement benefits plan. The bargaining history demonstrates that even the Company was operating under the assumption that a retirement healthcare and dental plan would always exist. The Company's history of imposing unilateral changes to the terms of the coverage is understandable within this framework. However, replacing the entire retiree healthcare and dental program far exceeds the expectations of the parties based on a 30-year bargaining record.

In conclusion, the 2013 Changes were a material departure from prior changes. Historical changes affecting MERs never even remotely suggested that the Company would ever replace their defined health and dental insurance benefits with an annual voucher payment to be administered by a third party broker, essentially requiring MERs to fend for themselves in the insurance marketplace. Indeed, the record demonstrates, and the Company stresses, that participation in its corporate-wide plans has always been voluntary and each of the Unions has always been free to propose site-specific alternative benefit medical and dental benefit plans. It also insists that it has been willing to bargain over locally based-proposals and would do so again if the Unions proposed alternative secondary coverage plans. That is a hollow claim by the Company, raised for the first time in its brief, given that Locals 593, 788 and 992 objected to the 2013 Changes in October 2012 and demanded bargaining. The Company declined or ignored those requests which, in accordance with past practice, might have produced counterproposals by the Unions for bargaining over alternative site-specific plans.

Accordingly, the Company's unilateral implementation of the 2013 Changes without first offering Locals 593, 788, and 992 the opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. E. I. DuPont de Nemours and Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Parties, Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of Dupont Workers, Freon Craftsman Union, Local 788, International Brotherhood of Dupont Workers, and International Brotherhood Of Dupont Workers (IBDW), Local 593, Old Hickory Employees Council, are labor organizations within the meaning of Section 2(5) of the Act and are the recognized collective-bargaining representatives of bargaining units composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facilities in Richmond, Virginia, Louisville, Kentucky, and Nashville, Tennessee.

3. On January 1, 2013, the Company violated Section 8(a)(5) and (1) by replacing secondary health and dental insurance to its Medicare-eligible retirees with an annual voucher toward the procurement of some version of such coverage from among choices provided by a third party broker, and failing to bargain over these changes upon request by Locals 593, 788, and 992.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has violated Section 8(a)(5) of the Act by failing to bargain with Locals 593, 788 and 992 concerning the changing of secondary health and dental insurance to its Medicare-eligible retirees, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice to employees. Specifically, I shall order the Company to rescind, for Medicare-eligible retirees, the change in its retiree healthcare and dental program, implemented January 1, 2013, providing them with an annual voucher to procure some version of such coverage from among the choices provided by a third party broker, and restore MEDCAP and DAP insurance coverage for Medicare-eligible retirees to the same terms and conditions as they existing on December 31, 2012. The Company shall, on demand by Locals 593, 788 and 992, bargain in good faith regarding any Company proposal to change health and dental care benefits for Medicare-eligible retirees.

In the event that this Remedy is not adhered to, bargaining unit members who are Medicare-eligible retirees, over time, will be adversely affected by the replacement of their current secondary health and dental coverage with an annual $1500 voucher into a Health Savings Account to the extent that their labor representatives will be unable to bargain with the Company over the terms and conditions of coverage. In that case, the Company shall make whole its Medicare-eligible retirees for any loss of health or dental care benefits suffered as a result of the Company's unlawful modifications. Payments for lost benefits are to be computed in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest, as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[126]

ORDER

The Respondent, E. I. DuPont de Nemours and Company, Wilmington, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally announcing and changing employees' retirement health and dental benefits.

[126] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Making material, substantial and significant changes to secondary retirement health and dental benefits of unit employees without first notifying the Union and affording it an opportunity to bargain over such changes and their effects.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral material changes to retiree benefits implemented on January 1, 2013, as they relate to the replacement of secondary health and dental benefits for Medicare-eligible retirees with an annual voucher payment into a Health Savings Account for the procurement of secondary health and dental coverage from providers on a list supplied by a third party insurance broker.

(b) Meet and bargain in good faith with Locals 593, 788 and 992, upon request, about the MEDCAP Plans and DAP Plans and if an agreement is reached regarding those plans, reduce the agreements to writing and execute them.

(c) Restore the benefits for the unit employees in the following bargaining units under the MEDCAP and DAP Plans that existed prior to the unlawful unilateral changes implemented on January 1, 2013:

Local 992 Medicare-eligible retirees formerly employed by the Company as:
All non-exempt monthly salary roll clerical, technical, and office employees of the Spruance Fibers Plant located at the Ampthill, Chesterfield County, Virginia plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Case Number 5-R-2835, bearing date of December 26, 1946; but excluding all hourly wage roll production and maintenance employees, nurses, security officers, Secretary/Administrative Assistant, Salary Roll, personnel Services Personnel, Contract Administration clerks, Systems Technicians, Video Specialist, employees on the no-service roll, student operators, student engineers, co-op students, and all supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

All production, maintenance, service and Plant technical hourly wage roll employees at the Spruance Fibers Plant located at Ampthill, Chesterfield County, Virginia, included within the union appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Cases Nos. 5-R-2724, 5-R-2773, 5-R-2791 bearing date of January 31, 1947; but excluding all employees classified as instructors, instructresses, security officers, Limited Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth in said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

Local 593 Medicare-eligible retirees formerly employed by the Company as:
The hourly wage roll production, maintenance, and power house employees at the [Old Hickory, Nashville, Tennessee] Plant, including instructors, but excluding guards, firemen, fire inspectors, office, clerical, salaried technical, and professional employees, and relief supervisors who serve in that capacity either regularly or for substantial periods of time during the course of the year, and all other supervisors as defined in the Labor-management Relations Act.

Local 788 Medicare-eligible retirees formerly employed by the Company as:
All employees of the E. I. Du Pont De Nemours and Company included within the unit appropriate for collective bargaining purposes established in an order of the National Labor Relations Board in Case No. 9-RC-18290 bearing date of May 14, 2010; viz., all employees of E. I. Du Pont De Nemours and Company at its Louisville Works, Louisville, Kentucky, including powerhouse and refrigeration plant employees, chief operators, shift leaders and fire department employees, but excluding all office and clerical employees, chemical supervisors, technical engineers, assistant technical engineers, draftsmen, chemists, nurses and hospital technicians, general foremen, foremen , fire chief, guards, and all other supervisors and professional employees as defined in the National Labor Relations Act as amended.

(d) Make unit employees whole by reimbursing them, with interest, for any loss of benefits suffered and additional expenses suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans, and maintain those terms in effect until the parties bargain to a new agreement, or a valid impasse, or until the Union has agreed to changes.

(e) Within 14 days after service by the Region, post at its facility in Ampthill, Chesterfield County, Virginia, copies of the attached notice marked "Appendix A."[127] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means as the Company customarily communicates with its employees and retirees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees.

(f) Within 14 days after service by the Region, post at its facility in Nashville, Tennessee, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Company's authorized

[127] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means as the Company customarily communicates with its employees and retirees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company.

(g) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix C." Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means as the Company customarily communicates with its employees and retirees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company.

Dated, Washington, D.C. December 16, 2013

_____

Michael Rosas
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with AMPTHILL RAYON WORKERS, INC., LOCAL 992, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (the Union), as the exclusive representative of our employees in the following collective-bargaining units:

All non-exempt monthly salary roll clerical, technical, and office employees of the Spruance Fibers Plant located at the Ampthill, Chesterfield County, Virginia plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Case Number 5-R-2835, bearing date of December 26, 1946; but excluding all hourly wage roll production and maintenance employees, nurses, security officers, Secretary/Administrative Assistant, Salary Roll, personnel Services Personnel, Contract Administration clerks, Systems Technicians, Video Specialist, employees on the no-service roll, student operators, student engineers, co-op students, and all supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

All production, maintenance, service and Plant technical hourly wage roll employees at the Spruance Fibers Plant located at Ampthill, Chesterfield County, Virginia, included within the union appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in Cases Nos. 5-R-2724, 5-R-2773, 5-R-2791 bearing date of January 31, 1947; but excluding all employees classified as instructors, instructresses, security officers, Limited Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth in said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

WE WILL NOT make unilateral changes to employees' MEDCAP Plans and DAP Plans without first notifying Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, and bargaining about any proposed changes to these plans.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL, on request of Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, restore the unit employees' benefits under the MEDCAP Plans and DAP Plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2013, and maintain those terms in effect until the parties have bargained to a new agreement, or a valid impasse, or until the Union has agreed to changes.

WE WILL meet and bargain in good faith with the Ampthill Rayon Workers, Inc., Local 992, International Brotherhood of DuPont Workers, upon request, about the MEDCAP Plans and DAP Plans and should we reach agreement regarding those plans, we will reduce the agreements to writing and execute them.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of any benefits and additional expenses that they may have suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans.

E.I. DU PONT DE NEMOURS AND COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1099 14t h Street, NW, Suite 6300, Washington, D.C. 20570
(202) 208-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL (the Union), as the exclusive representative of our employees in the following collective-bargaining units:

> The hourly wage roll production, maintenance, and power house employees at the [Old Hickory, Nashville, Tennessee] Plant, including instructors, but excluding guards, firemen, fire inspectors, office, clerical, salaried technical, and professional employees, and relief supervisors who serve in that capacity either regularly or for substantial periods of time during the course of the year, and all other supervisors as defined in the Labor-management Relations Act.

WE WILL NOT make unilateral changes to employees' MEDCAP Plans and DAP Plans without first notifying INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL, and bargaining about any proposed changes to these plans.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL, on request of INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES COUNCIL, restore the unit employees' benefits under the MEDCAP Plans and DAP Plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2013, and maintain those terms in effect until the parties have bargained to a new agreement, or a valid impasse, or until the Union has agreed to changes.

WE WILL meet and bargain in good faith with the INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (IBDW), LOCAL 593, OLD HICKORY EMPLOYEES

COUNCIL, upon request, about the MEDCAP Plans and DAP Plans and should we reach agreement regarding those plans, we will reduce the agreements to writing and execute them.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of any benefits and additional expenses that they may have suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans.

E.I. DU PONT DE NEMOURS AND COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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APPENDIX C

NOTICE TO EMPLOYEES

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National Labor Relations Board
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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS (the Union), as the exclusive representative of our employees in the following collective-bargaining units:

All employees of the E. I. Du Pont De Nemours and Company included within the unit appropriate for collective bargaining purposes established in an order of the National Labor Relations Board in Case No. 9-RC-18290 bearing date of May 14, 2010; viz., all employees of E. I. Du Pont De Nemours and Company at its Louisville Works, Louisville, Kentucky, including powerhouse and refrigeration plant employees, chief operators, shift leaders and fire department employees, but excluding all office and clerical employees, chemical supervisors, technical engineers, assistant technical engineers, draftsmen, chemists, nurses and hospital technicians, general foremen, foremen , fire chief, guards, and all other supervisors and professional employees as defined in the National Labor Relations Act as amended.

WE WILL NOT make unilateral changes to employees' MEDCAP Plans and DAP Plans without first notifying FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS, and bargaining about any proposed changes to these plans.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.

WE WILL, on request of FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS, restore the unit employees' benefits under the MEDCAP Plans and DAP Plans to the terms that existed prior to the unlawful unilateral changes that were implemented on January 1, 2013, and maintain those terms in effect until the parties have bargained to a new agreement, or a valid impasse, or until the Union has agreed to changes.

WE WILL meet and bargain in good faith with the FREON CRAFTSMAN UNION, LOCAL 788, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS, upon request, about the MEDCAP Plans and DAP Plans and should we reach agreement regarding those plans, we will reduce the agreements to writing and execute them.

WE WILL make unit employees whole by reimbursing them, with interest, for the loss of any benefits and additional expenses that they may have suffered as a result of the unilateral changes to the MEDCAP Plans and DAP Plans.

E.I. DU PONT DE NEMOURS AND COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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